SUPREME COURT OF APPEALS OF VIRGINIA.

BOLLING, et al. *v.* MULLINS.

(September 15, 1910.)

Judicial Sales—Agreements Tending to Stifle Competition.—The governing principle of all judicial sales is, that there shall be untrammelled, free and open competition, to the end that the rights of all parties in interest may be protected and a fair price obtained for property which has been withdrawn from the control of the owner and is being administered by the courts. Any agreement, therefore, however speciously devised or craftily worded, which contravenes that policy will not be tolerated, and will be condemned as illegal and void.

Same—Same.—And the fact that the particular contract tends to promote rather than to stifle bidding, does not meet the policy of the law nor satisfy the exigency of the rule, where it does not appear that this combination was to accrue to the benefit of the persons interested in the property.

Error to Circuit Court of Wise County.
Affirmed.

Ayers & Fulton, Dotson & Bond, C. Q. Counts, for plaintiffs in error.
Vicars & Peery, Bond & Bruce, for defendant in error.

CARDWELL, J., absent.

WHITTLE, J.:

This writ of error brings under review a judgment dismissing the plaintiffs' declaration on demurrer, on the ground that the contract sued on is contrary to public policy and void.

The essential allegations of the declaration are, that the plaintiffs, as sureties of W. R. Gilley, had paid off liens against him aggregating $2,400, of which amount $1,700 still remained due from the principal debtor; that Gilley was insolvent with the exception of his ownership of a tract of land which was the subject matter of a lien creditor's suit; that the defendant, Mullins, who desired to purchase the land, had entered into an agreement with the plaintiffs to the effect that if they would not become bidders at the sale, he, Mullins, would, if necessary, bid as much as $1,500 for the property or would procure some one else to do so; and, if he should purchase the land either directly or through some other bidder for less than $1,500, that he would pay the plaintiffs the difference. Under this arrangement Mullins bought the land for $940, but refused to pay the plaintiffs the sum of $560, in accordance with his agreement.

We are of opinion that the case is controlled by the decision of this court in Camp *v.* Bruce, 96 Va. 521. In that case the purchaser at a judicial sale, before confirmation, sold his bargain at an advanced price; and it was held that the tendency of such contracts was to prevent the property from bringing the best price, and was therefore contrary to public policy. With respect to such agreements generally, the court at page 524 observes: "We have no statute declaring that contracts like the one under consideration are unlawful, yet under the principles of the common law any contract that is made for the purpose of, or whose necessary effect or tendency is to lessen competition and restrain bidding at judicial sales, is held to be illegal because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law, therefore, is to secure such sales from every kind of improper influence. To allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price, is condemned by the law, and the courts will not enforce contracts founded in such practices. Underwood *v.* McVeigh, 23 Gratt. 409, 428-9; Cocks *v.* Izard, 7 Wall. 559, 562; Fry on Spec. Per., sec. 308; Pomeroy's Contracts, sec. 283; Greenhood on Public Policy, pages 183 to 189."

In Cocke *v.* Izard, supra, the Supreme Court of the United States, speaking through Mr. Justice Davis, says: "The law will not tolerate any influence likely to prevent competition at judicial sales, and it accords to every debtor the chance for a fair sale and full price."

Indeed, the governing principle of all judicial sales is, that there shall be untrammelled, free and open competition, to the end that the rights of all parties in interest may be protected and a fair price obtained for property which has been withdrawn from the control of the owner and is being administered by the courts. Any agreement, therefore, however speciously devised or craftily worded, which contravenes that policy will not be tolerated, and will be condemned as illegal and void.

The contention that this particular contract was calculated to promote rather than to stifle bidding, is met by the obvious answer, that the sum in addition to his bid, which Mullins stipulated to pay, was not intended to reach the right pocket. Hamilton *v.* Hamilton (S. C.), 46 Am. Dec., 56, 63. The neat result of the transaction was to deprive the judgment debtor of a credit of $560, at the least, on his indebtedness to which he was justly entitled.

In condemning this agreement, we are not unmindful of the qualification of the general rule which sanctions a fair and open

compact between creditors (made with the knowledge and assent of the debtor), that certain debts will be taken care of, provided the holders thereof will abstain from bidding. Such adjustments are often convenient and beneficial to all concerned, but this agreement is not of that class. It is even more clearly violative of the policy of the law than was the agreement in Camp *v.* Bruce, and it is not our purpose to relax the stringency of the just rule announced in that case.

The judgment of the Circuit Court is without error and must be affirmed.

Affirmed.

Note.

Agreements to Stifle Competition at Public Sales.—Where property is to be sold at public auction, and especially where the sale is made by order of a court, or is made in the course of governmental administration, a secret combination and agreement among persons interested in bidding, whereby they stipulate to refrain from bidding, in order to prevent competition, and to lower the selling price of the property, is illegal, according to the uniform course of decision in this country, and will not be enforced at the instance of the contracting parties, or either of them. 2 Pom. Eq. Jur., § 934; Barnes *v.* Morrison, 97 Va. 372, 34 S. E. 93; Camp *v.* Bruce, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146; Henderson *v.* Henrie, 61 W. Va. 183, 56 S. E. 369; Ralphsnyder *v.* Shaw, 45 W. Va. 680, 31 S. E. 953; Horn *v.* Star Foundry Co., 23 W. Va. 522.

And this rule has been applied in the case of attachment sales. Underwood *v.* McVeigh, 23 Gratt. 409.

And tax sales by the government of the property of delinquents. Barnes *v.* Morrison, 97 Va. 372, 34 S. E. 93.

"But this rule extends only to the combinations having for their objects to stifle fair competition with the design of purchasing at a price less than the fair value of the property." Ralphsnyder *v.* Shaw, 45 W. Va. 680, 31 S. E. 953, 956.

A contract between two or more persons to purchase, jointly, property offered for sale at public auction, is not invalid, if free from fraud and collusion, as where their uniting to purchase the property is in good faith and with an honest purpose in view, and not with the intention of stifling and suppressing the bidding, in order to obtain the property at an undervalue. Henderson *v.* Henrie, 61 W. Va. 183, 56 S. E. 369.

Whether such a combination is lawful or otherwise depends upon the intention of the parties, and the effect of the arrangement as ascertained from the evidence in each particular case. Barnes *v.* Morrison, 97 Va. 372, 34 S. E. 93.

As a general rule a purchaser at a judicial sale cannot, before confirmation, sell his bargain to another at an advance price. Such a contract tends to prevent the property from bringing the best price, and is therefore contrary to public policy, and void. Camp *v.* Bruce, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146.

But an offer to buy at an advance from a purchaser at a judicial sale, before confirmation, which the purchaser declines to accept for lack of interest in the property, or power to sell, in no wise infringes upon this general rule. Nitro-Phosphate Syndicate *v.* Johnson, 100 Va. 774, 42 S. E. 995, explaining Camp *v.* Bruce, 96 Va. 521, 31 S. E. 901, 907, 70 Am. St. Rep. 873, 43 L. R. A. 146.

Effect of Agreement or Consent.—This court held, in Roudabush *v.* Miller, 32 Gratt. 454, that, where two or more persons were desirous of acquiring different parcels of a tract of land offered for sale at auction by commissioners under a decree of court, it was not unlawful nor improper for them to bid for the whole tract, with the understanding that they would divide it, if they became purchasers, with respect to the convenience and advantage of the situation of the several parcels to their own lands respectively. Cited in Barnes *v.* Morrison, 97 Va. 372, 34 S. E. 93.

Burden of Proof and Weight of Evidence.—But the burden is upon the party alleging such a contract to prove it by clear and satisfactory evidence. Nitro-Phosphate Syndicate *v.* Johnson, 100 Va. 774, 42 S. E. 995.

The mere statement by a bidder to a friend, pending the sale, that if he purchased the whole tract of land then offered, and which had been previously offered in parcels, he would sell him a part of it, is not sufficient for that purpose. Hamilton *v.* Stephenson, 106 Va. 77, 55 S. E. 577.

Bids on Public Contracts.—The fact that the bid of a contractor upon a work of great magnitude was far below that of the next lowest bidder, is not a circumstance from which a fraudulent purpose must be deduced. University of Virginia *v.* Snyder, 100 Va. 567, 42 S. E. 337.